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15 Attorneys for Plaintiffs Center for Biological Diversity, Kentucky Environmental Foundation,
16 and Sierra Club

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY
KENTUCKY ENVIRONMENTAL
FOUNDATION, and SIERRA CLUB,

Plaintiffs,

v.

RURAL UTILITIES SERVICE, a federal agency
with the United States Department of Agriculture,

Defendant.

Case No. _____

COMPLAINT AND REQUEST FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is a civil action for declaratory and injunctive relief under the Administrative Procedures Act (APA), 5 U.S.C. § 551-706. The claims arise from defendant's violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d), and its implementing regulations, 40 C.F.R. §§ 1500-1508.

2. This action is brought pursuant to the right of review provision of the APA, 5 U.S.C. § 702.

3. Defendant violated federal law in its preparation of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for "possible financing assistance to East Kentucky Power Cooperative (EKPC) for the construction of two new J.K. Smith Station combustion turbine electric generating units (CTs), two new electric switching stations, and the 36-mile, Smith-West Garrard 345 kilovolt (kV) electric transmission line located in Clark, Madison, and Garrard Counties, Kentucky" ("the transmission line project").

4. Plaintiffs challenge defendant's failure to meet their procedural and substantive duties required by NEPA by failing to adequately perform environmental review procedures in its Environmental Assessment (EA) for the transmission line project and Finding of No Significant Impact (FONSI). Plaintiffs further challenge defendant's failure to prepare an Environmental Impact Statement (EIS) examining all potentially significant environmental impacts of the transmission line project as required by NEPA.

5. Plaintiffs seek:

- a. An order declaring that defendant failed to comply with NEPA;
- b. An order enjoining defendant from undertaking activities unless and until defendant complies with NEPA and the APA;
- c. An award of plaintiffs' reasonable attorneys' fees and costs associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;
- d. Such additional and further relief as the Court deems just and equitable.

6. The requested relief is necessary to preserve the *status quo*, to prevent illegal agency action, and to forestall irreparable injury to the environment.

II. JURISDICTION, VENUE, AND BASIS FOR RELIEF

7. This Court properly has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1346(2) (United States as defendant). Judicial review is authorized by 5 U.S.C. § 706 because plaintiffs are adversely affected within the meaning of relevant statutes.

8. Plaintiff Sierra Club is incorporated in California and resides and maintains its headquarters in San Francisco County in California. Venue is properly vested in this Court by 28 U.S.C. § 1391(e). The other two plaintiffs defer to the venue established by Sierra Club.

9. Declaratory relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2201. Injunctive relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2202.

III. INTRADISTRICT ASSIGNMENT

10. This action is properly assigned to the San Francisco Division of this Court because Plaintiff Sierra Club is based in San Francisco and Plaintiff Center for Biological Diversity maintains an office in San Francisco.

IV. PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands throughout the United States. The Center has over 40,000 members, including approximately 280 members who reside in Kentucky, and offices in San Francisco, San Diego, and Los Angeles, California; Tuscon and Phoenix, Arizona; Silver City, New Mexico; Washington, D.C. and Portland, Oregon. The Center and its staff and members have an interest in ensuring the environmental quality of the areas which will be affected by the challenged project. The Center's members and staff regularly use lands and intend to continue to use lands throughout the United States, including lands affected by the challenged project, for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center's members derive scientific, recreational, health and aesthetic benefits from the protection of these areas.

12. Plaintiff KENTUCKY ENVIRONMENTAL FOUNDATION ("KEF") is a non-profit corporation organized under the laws of Kentucky, and maintains its offices in Berea, Kentucky. KEF's members and staff use, enjoy, own and recreate on lands that are likely to be affected by the

1 challenged project. Members and staff of KEF live, exercise, work, raise children, farm, garden,
2 recreate, fish, birdwatch, and hike, and will continue to do so on a regular basis, in Madison, Jackson
3 and other counties in Kentucky near Clark County where the facility and its transmission lines are
4 proposed. KEF would sustain injury to its interests if the challenged project is undertaken in the
5 absence of a legally and scientifically sufficient analysis of the project's environmental and socio-
6 economic impacts. The interests of plaintiff and its members would sustain further injury because
7 the project will degrade air quality, including air quality related values such as visibility and
8 deposition of toxic and acidic substances in and around the project area and the areas where
9 members and staff of KEF live, exercise, work, raise children, farm, garden, recreate, fish,
10 birdwatch, and hike. In addition, a NEPA analysis that fully and fairly compared the transmission
11 line and all the generating units it will serve to other alternatives would provide KEF with valuable
12 information about economic and environmental impact of the transmission line and generating units
13 versus other options such as renewable energy and demand side management. Defendant's violations
14 of NEPA deny KEF this valuable information.

15 13. Plaintiff SIERRA CLUB is the oldest, largest and most influential grassroots
16 environmental organization in the country. Founded in 1892 by John Muir, the Sierra Club is a
17 non-profit organization with over 775,000 members. The Cumberland Chapter, with over 5000
18 members, is one of 64 chapters working together to protect wildlands and wildlife, through political,
19 legal and educational channels. The members of the Cumberland Chapter use, enjoy, own and
20 recreate on lands that are likely to be affected by the challenged project. Members of the Sierra Club
21 live, exercise, work, raise children, farm, garden, recreate, fish, birdwatch, and hike, and will
22 continue to do so on a regular basis, in Madison and other Counties in Kentucky which are near or
23 border Clark County where the facility and its transmission lines are proposed. Plaintiff would
24 sustain injury to its interests if the challenged project is undertaken in the absence of a legally and
25 scientifically sufficient analysis of the project's environmental and socio-economic impacts. The
26 interests of plaintiff and its members would sustain further injury because the project will degrade air
27 quality, including air quality related values such as visibility and deposition of toxic and acidic
28 substances in and around the project area and the areas where members of Sierra Club live, exercise,

1 work, raise children, farm, garden, recreate, fish, birdwatch, and hike. In addition, a NEPA analysis
2 that fully and fairly compared the transmission line and all the generating units it will serve to other
3 alternatives would provide Sierra Club with valuable information about economic and environmental
4 impact of the transmission line and generating units versus other options such as renewable energy
5 and demand side management. Defendant's violations of NEPA deny Sierra Club this valuable
6 information.

7 14. Plaintiffs commented on the Environmental Assessment for the transmission line
8 project.

9 15. Defendant RURAL UTILITIES SERVICE (RUS) is a federal agency within the U.S.
10 Department of Agriculture.

11 V. SUMMARY OF FACTS

12 A. The Transmission Line Project

13 16. In June 2007 defendant invited comments on an Environmental Assessment (EA) for
14 the transmission line project.

15 17. Defendant proposed providing financial assistance to East Kentucky Power
16 Cooperative (EKPC) for the construction of two new combustion turbine electric generating units
17 (CTs) at its existing J.K. Smith Electric Generating Station in southern Clark County, Kentucky,
18 utilizing natural gas as a fuel source.

19 18. Defendant stated that the proposed new units were needed to provide additional
20 electric generating capacity that would allow EKPC to meet its projected electrical peaking demand
21 in the 2009-2011 period.

22 19. Defendant also proposed assisting EKPC with construction of two new electric
23 switching stations, one at its existing J.K. Smith Generating Station ("the Smith Plant") and one in
24 western Garrard County, Kentucky (disturbing between 5 and 10 acres); and a 36-mile, 345 kilovolt
25 electric transmission line (on a 150-foot right-of-way) that would extend through Clark, Madison,
26 and Garrard Counties, Kentucky, between the proposed new switching stations.

27 20. The new transmission line would be supported by vertical H-frame steel pole
28 structures that would range in height from 90 to 130 feet above ground.

21. Defendant stated in the EA that the proposed new transmission facilities were needed to provide an outlet for the additional electric power that would be generated at the Smith Plant as a result of the installation of the proposed new CTs as well as new circulating fluidized-bed (CFB) coal-fired units, which defendant is analyzing in a separate Environmental Impact Statement.

22. The EA makes no mention of the CFB units for which this transmission capacity is being proposed.

23. EKPC's May 17, 2006 "System Impact Study" ("SIS") for the "Generation Interconnection Requests #30-33, JK Smith Combustion Turbines #812 and CFS Unit #1 Project in Clark County, Kentucky" states: "The existing four 138 kV transmission lines connected to the J.K. Smith Substation are insufficient to accommodate delivery of the total net output of the expanded J.K. Smith Power Plant. In fact, it was determined that the existing transmission outlets cannot accommodate any generation additions at the site."

24. The SIS evaluates the transmission needs of the CTs and CFB units combined.

25. As of the June 2007 notice for the transmission line project, the construction of that project was tentatively scheduled to begin in the fall of 2007 with estimated construction duration of two years.

26. Plaintiffs commented on the EA.

27. On September 19, 2007, defendant issued a Finding of No Significant Impact (FONSI) for the transmission line project, stating that there would be no significant impacts associated with the implementation of the transmission line project, and that therefore the agency did not have to prepare an Environmental Impact Statement (EIS).

B. The Smith Plant Expansion

28. The Smith Plant is currently a peaking station, designed to provide electricity during times of peak usage, generally during hot summer and cold winter months.

29. The seven peaking units currently in operation at the facility are combustion turbines, fueled by oil and natural gas with production of 626 megawatts in the summer and 842 megawatts in the winter.

30. In addition to the transmission line project, EKPC, the owner and operator of the

1 Smith Plant, is currently planning an increase in peaking capacity through the addition of two new
2 natural gas combustion units, and is also planning two new 278 megawatt coal-fired units that will
3 be baseload units rather than just at times of peak demand.

4 31. These new coal-fired generating units stand to increase the production capacity of the
5 Smith Plant by more than 700 megawatts, and will be supported by the 36 miles of new, large-
6 capacity transmission lines.

7 32. Neither coal-fired unit at the Smith Plant could deliver its electricity without the
8 large-capacity transmission line project considered in the EA.

9 33. Defendant is currently preparing a separate Environmental Impact Statement for the
10 proposed coal-fired generating units at the Smith Plant expansion.

11 VI. VIOLATIONS OF LAW

12 COUNT I

13 Violation of NEPA

14 Improper Segmentation of Connected Actions

15 34. Plaintiffs incorporate by reference paragraphs 1 through 33.

16 35. NEPA requires that proposals "which are related to each other closely enough to be,
17 in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. §
18 1502.4(a).

19 36. A NEPA document is also required to analyze the impacts of "[c]onnected actions,"
20 which is actions that are "closely related," including actions that are "interdependent parts of a larger
21 action and depend on the larger action for their justification." *Id.* § 1508.25(1).

22 37. The transmission line project and the addition of the coal-fired units at the Smith
23 Plant are "connected actions" as defined by NEPA.

24 38. Defendant has violated NEPA by failing to address in a single NEPA document the
25 impacts of the two projects.

26 39. By failing to address these connected actions in a single NEPA document, defendant
27 violated NEPA, 42 U.S.C. §§ 4321-4370d.

28 40. These actions were taken not in accordance with law, without observance of

1 procedures required by law, and are arbitrary and capricious within the meaning of the APA. 5
2 U.S.C. § 706.

3 41. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this
4 litigation pursuant to the Equal Access to Justice Act.

5 **COUNT II**

6 **Violation of NEPA**

7 **Failure to Adequately Disclose and Analyze Environmental Impacts**

8 42. Plaintiffs incorporate by reference paragraphs 1 through 33.

9 43. The National Environmental Policy Act (NEPA) requires federal agencies to analyze
10 the foreseeable environmental impacts, including direct, indirect, and cumulative impacts, of "major
11 federal actions." 42 U.S.C. § 4332(c)(1); 40 C.F.R. 1508.7.

12 44. NEPA requires the analysis and consideration of cumulative effects which result from
13 the incremental impact of the action when added to other past, present, and reasonably foreseeable
14 future actions. 40 C.F.R. § 1508.25(a).

15 45. The transmission line project and the addition of the coal-fired units at the Smith
16 Plant are both major federal actions as defined by NEPA.

17 46. An Environmental Assessment (EA) must "provide sufficient evidence and analysis
18 for determining whether" the project will have a significant impact on the environment. 40 C.F.R. §
19 1508.9(a)(1).

20 47. The EA fails to adequately analyze the cumulative effects of the transmission line
21 project when taken together with the addition of the coal-fired units at the Smith Plant.

22 48. Defendant's actions as described above are arbitrary, capricious, not in accordance
23 with law, and without observance of procedures required by law, within the meaning of the APA, 5
24 U.S.C. § 706.

25 49. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this
26 litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

27 **COUNT III**

28 **Violation of NEPA**

Failure to Prepare an EIS

50. Plaintiffs incorporate by reference paragraphs 1 through 33.

51. NEPA requires an Environmental Impact Statement (EIS) for any major Federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.3.

52. Defendant violated NEPA by preparing only an Environmental Assessment for the transmission line project, and by issuing a "Finding of No Significant Impact" for the project, because the project may significantly affect the environment.

53. These actions were taken not in accordance with law, without observance of procedures required by law, and are arbitrary and capricious within the meaning of the APA. 5 U.S.C. § 706.


54. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act.

RELIEF REQUESTED

Plaintiffs seek an order:

- a. declaring that defendant failed to comply with NEPA and the APA in issuing the transmission line project decision;
- b. enjoining defendant from undertaking any activities related to the transmission line project, unless and until defendant has complied with NEPA and the APA.
- c. awarding plaintiffs their reasonable attorneys fees and costs incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- d. granting plaintiffs such additional relief as the Court deems just and equitable.

DATED: March 3, 2008


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JS 44 (Rev. 12/07) (and rev 1-16-08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS

Center for Biological Diversity, Kentucky Environmental Foundation,
Sierra Club

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

San Francisco

(c) Attorney's (Firm Name, Address, and Telephone Number)

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DEFENDANTS

Rural Utilities Service

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) SOCIAL SECURITY <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 FEDERAL TAX SUITS
				<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Administrative Procedures Act (APA), 5 U.S.C. 551-706

Brief description of cause:

Violation of National Environmental Policy Act (NEPA) and its implementing regulations

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 0

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE"

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND

☐ SAN JOSE

DATE

3/3/08

SIGNATURE OF ATTORNEY OF RECORD

Matthew Vespa